1-20-2012

State v. Grant Respondent's Brief Dckt. 38325

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38325, 38326, 38327
	)	
vs.	)	
	)	
WOODROW JOHN GRANT,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

HONORABLE ROBERT C. NAFTZ
District Judge

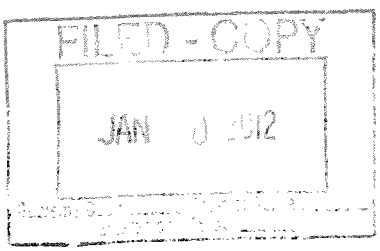
LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

ELIZABETH A. KOECKERITZ
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR
PLAINTIFF-RESPONDENT

SHAWN F. WILKERSON
Deputy State Appellate
Public Defender
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712



ATTORNEY FOR
DEFENDANT-APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

RULES

CONSTITUTIONAL PROVISIONS

STATEMENT OF THE CASE

Nature Of The Case

John Woodrow Grant appeals from his convictions for domestic battery, possession of methamphetamine and aggravated battery.

Statement Of The Facts And Course Of The Proceedings

In case number CR 2005-10538-FE, Grant was charged with Aggravated Battery for shooting Tyler Solomon with a gun. (R., vol. I, pp. 87-88.) The evidence showed that Grant fired a loaded weapon into a crowd while involved in a fight and the bullets hit Solomon in the face and chest. (2006 PSI, pp. 2-4.) Grant pled guilty to the charge (R., vol. 1, pp. 115-16), and was sentenced to 10 years with four years fixed and the district court retained jurisdiction (R., vol. I, pp. 122-24). Upon successfully completing his rider, the district court suspended Grant's sentence and placed him on probation for four years. (R., vol. I, pp. 126-27.)

Three years later, Grant was charged with possession of methamphetamine in case number CR 2009-19445-FE. (R., vol. II, pp. 211-12.) A week later, in case number CR 2009-19451-FE, he was charged with domestic battery, aggravated assault and unlawful possession of a firearm, for burning his girlfriend, Karoline Monroe's, face with a cigarette and holding a gun against her head. (R., vol. II, pp. 344-45.) Due to the new charges, Grant's probation officer filed a report of probation violation in Grant's 2005 case where he asserted that Grant had violated his probation by using methamphetamine and committing the new offenses. (R., vol. I, pp. 130-31.)

Prior to Grant's scheduled change of plea hearing, Grant's attorney filed a motion to withdraw as counsel in Grant's possession of methamphetamine case (CR 2009-19445-FE), arguing, inter alia, that Grant had "insisted on pursuing an objective that the undersigned considers imprudent and unreasonable." (R., vol. II, pp. 230-31.) The motion was denied after a hearing. (R., vol. II, pp. 232-33.)

Pursuant to a plea agreement, Grant pled guilty to possession of methamphetamine in case number CR 2009-19445-FE and domestic battery in case number CR 2009-19451-FE. (R., vol. II, pp. 256, 262-63, 378, 383-84.) In the methamphetamine case, Grant was sentenced to five years with two years fixed. (R., vol. II, pp. 271-75.) In the domestic battery case, Grant was sentenced to 10 years with five years fixed. (R., vol. II, pp. 396-400.) The district court revoked his probation in his 2005 case and ordered his sentence of ten years with four fixed executed. (R., vol. I, pp. 146-50.) The district court ordered Grant's sentences in the 2009 cases to run concurrently with each other but consecutive to the sentence in his 2005 case. (R., vol. I, p. 148, vol. II, pp. 272, 397.) In sum, the district court sentenced Grant to 20 years with nine years fixed. Grant filed Rule 35 motions in each case (R., vol. II, pp. 402-03), which was denied (R., vol. II, pp. 405-06). Grant timely appealed. (R., vol. I, pp. 158-60, vol. II, pp. 408-10.)

ISSUES

Grant states the issues on appeal as:

> 1. Did the Idaho Supreme Court deny Mr. Grant due process and equal protection when it denied his Motion to Augment with the transcript of the jurisdictional review hearing?
>
> 2. Did the district court err when it failed to grant defense counsel's motion to withdraw?
>
> 3. Did the district court err when it admitted the victim's impact statement?
>
> 4. Did the district court abuse its discretion when it ordered Mr. Grant's sentence in the 2005 case to run consecutively with the sentences in the 2009 cases?
>
> 5. Did the District Court abuse its discretion when it denied Mr. Grant's Idaho Criminal Rule 35 Motion for a Reduction of Sentence in light of Mr. Grant's continuing family support?

(Appellant's brief, p. 6.)

The state rephrases the issues as:

1. Does Grant's constitutional due process/equal protection claim fail because he failed to show that the requested transcript was necessary for appellate review of any issue presented in his case on appeal?

2. Has Grant failed to preserve for appeal his claim that the district court erred in denying his attorney's motion to withdraw as counsel?

3. Has Grant failed to show that the district court erred in admitting the victim impact statement in its entirety?

4. Has Grant failed to show that the district court abused its discretion in ordering the sentence in his 2005 case to run consecutively to the sentences in his other cases?

5. Has Grant failed to show that the district court abused its discretion in denying his Rule 35 motion?

ARGUMENT

I.
Grant Has Failed To Demonstrate That The Idaho Supreme Court Violated His Rights To Due Process And Equal Protection By Denying His Motion To Augment

A. Introduction

The Idaho Supreme Court denied augmentation of the record in Case Number CR 2005-10538 with a transcript of Grant's 2006 jurisdictional review hearing. (Order, dated August 6, 2011.) Grant asserts that by denying his motion to augment, the Idaho Supreme Court denied him due process and equal protection because he "cannot obtain a merit based appellate review of his sentencing claims" and "because he cannot obtain effective assistance of counsel on appeal." (Appellant's brief, pp. 8, 14 (capitalization altered; underlining omitted).) Grant has failed to show error, however, because he has made no showing that the transcripts were a necessary part of the record on appeal. He has failed to demonstrate that absent the requested transcript, this Court cannot adequately review whether the district court erred when it revoked Grant's probation and ordered his original sentence executed or when it denied his Rule 35 motion.

B. Standard Of Review

Constitutional issues involving questions of law are given free review, State v. Casey, 125 Idaho 856, 876 P.2d 138 (1994).

C. Grant's Due Process And Equal Protection Claims Fail Because He Failed To Show That The Requested Transcript Was Necessary For Appellate Review Of Any Issue Presented On Appeal

A defendant in a criminal case has a due process right to "a record on appeal that is sufficient for adequate appellate review of the errors alleged regarding the proceedings below." State v. Strand, 137 Idaho 457, 462, 50 P.3d 472, 477 (2002). However, the state "will not be required to expend its funds unnecessarily" to provide transcripts that "will not be germane to consideration of the appeal." Draper v. Washington, 372 U.S. 487, 495 (1963). An indigent defendant is entitled, at state expense, only to those transcripts and portions of the record necessary to pursue the issues raised on appeal. Griffin v. Illinois, 351 U.S. 12 (1956) (trial transcript on appeal of claimed trial errors); Lane v. Brown, 372 U.S. 477 (1963) (transcript of post conviction hearing on appeal of denial of relief). Thus, Grant is entitled to a transcript if it is "germane" and if no other method of providing a meaningful appeal is available. Draper, 372 U.S. at 499. Grant is not entitled to a transcript based on "an abstract need or desire" but must instead show "a legitimate claim of entitlement to it." Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 6 (1979) (citing Board of Regents v. Roth, 408 U.S. 564 (1972)). See also State v. Rhoades, 120 Idaho 795, 806, 820 P.2d 665, 676 (1991) (procedural due process issues are raised whenever a person risks being deprived of life, liberty or property interests because of governmental action); Stoneberg v. State, 106 Idaho 519, 521-522, 681 P.2d 994, 996-997 (1984) (court first must determine whether the specific interest threatened by government action is within contemplation of the liberty or property language of

the Fourteenth Amendment). Grant is thus entitled to transcripts at state expense only if they are necessary to complete a record adequate for appellate review of an issue. State v. Strand, 137 Idaho 457, 462, 50 P.3d 472, 476 (2002).

Grant has failed to demonstrate that a transcript of the 2006 jurisdictional review hearing, at which the court suspended Grant's sentence and placed him on probation, is necessary to complete a record adequate for appellate review of the 2010 actions of the district court in revoking his probation and not reducing his sentence. Grant has failed to show that the jurisdictional review hearing transcript has any relevance to the district court's decision to revoke his probation. There is no evidence that the district court had the transcript or that it relied upon anything said at Grant's 2006 jurisdictional review hearing when it revoked his probation in July 2010 and denied his Rule 35 motion in September 2010. In fact, the district court judge presiding at Grant's probation revocation proceeding and Rule 35 hearing was not the same judge who presided at his jurisdictional review hearing, making it impossible for the later judge to have relied upon anything said at the jurisdictional review hearing. (R., vol. I, pp. 126-27; vol. II, pp. 396-400, 405-06.) Further, in revoking his sentence the district court relied, primarily, on his plea of guilty to two new felonies and the facts surrounding his initial aggravated assault charge, which are included in the record. (Tr., p. 205, L. 17 – p. 215, L. 25.) Likewise, in denying his Rule 35 motion, the district court relied on the underlying facts in Grant's case and not anything that Grant may or may not have said four years earlier at the review

hearing. (Tr., p. 220, L. 21 – p. 222, L. 24.) In short, Grant has failed to show how the transcript is relevant to the any issue arising from revocation of probation and the denial of his Rule 35 motion, the only issues over which this Court has jurisdiction on appeal.

In State v. Hanington, 148 Idaho 26, 28, 218 P.3d 5, 8 (Ct. App. 2009), relied on by Grant, the Court of Appeals stated that appellate review of a sentence that is ordered into execution following a period of probation is based "upon **the facts** existing when the sentence was imposed as well as **events** occurring between the original sentencing and the revocation of probation." (Emphasis added.) The law is well established, however, that absent a showing that evidence was presented at prior hearings, and/or that the district court relied on such evidence in reaching its decision to revoke probation, an appellant is not entitled to transcription at public expense of every hearing conducted between sentencing and the date probation was finally revoked. See Strand, 137 Idaho at 462, 50 P.3d at 477 (quoting Draper v. Washington, 372 U.S. 487, 496 (1963)) ("'[T]he fact that an appellant with funds may choose to waste his money by unnecessarily including in the record all of the transcripts does not mean that the State must waste its funds by providing what is unnecessary for adequate appellate review.'"). Grant has simply failed to show that the transcript is necessary to establish or challenge any fact or event relevant to the order imposing the sentence after the probation violation.

Although there may be some circumstances that require inclusion in the appellate record of a transcript of a prior jurisdictional review hearing to fully

review the revocation of probation, Grant has failed to show that any such circumstances apply here. There is nothing provided by Grant that would indicate that any transcribable statement made at the jurisdictional review hearing, held nearly four years before the decisions at issue on this appeal, was considered or played any role in the district court's decision to revoke Grant's probation or deny his Rule 35 motion. Grant's claim of a due process violation is without merit.

Grant has also failed to establish a violation of equal protection. Grant cites to several cases where criminal defendants were denied appellate records *because of their indigence.* (See Appellant's brief, pp. 8-14 (citing, e.g., Griffin v. Illinois, 351 U.S. 12 (1956); Draper v. Washington, 372 U.S. 487, 495 (1963); Lane v. Brown, 372 U.S. 477 (1963)).) However, there is nothing in the record that in any way indicates that Grant was denied a transcript solely because he is indigent. In fact, Grant's motion would have properly been denied even if he had the funds to pay for the transcripts. The Idaho Supreme Court's order properly denied the motion to augment where Grant failed to make a showing that any appellant – indigent or otherwise – would be entitled to augment the record as requested.

The Idaho Appellate Rules require ***any*** party seeking augmentation to set forth a ground sufficient to justify the augmentation requested. I.A.R. 30. Grant's motion to augment failed because he failed to meet this minimal burden, imposed upon all parties, of showing that the transcript is necessary or even helpful in addressing appellate issues. There is no reason to believe that the motion to

augment would have been granted had Grant been paying for it – the rule applies to all parties, not just the indigent.

Grant has failed to show that the denial of his motion to augment was in any way influenced or decided by his indigence, and has therefore failed to show that the legal authority on which he relies is even germane. Grant has not shown that due process entitles him to any augmentation of the record merely because he has requested it, or that due process or equal protection is offended by a rule requiring a showing of grounds for augmentation – by any party -- before augmentation will be granted.

Grant has failed to show that the requested transcripts are necessary to complete a record adequate to review any issue on appeal. To the contrary, the record amply demonstrates that Grant's motion to augment was properly denied because he failed to show that the transcript was necessary for adequate review of any issue properly before the court. Grant has failed to show his due process rights were implicated, much less violated by the denial of his motion to augment. Because Grant has failed to demonstrate that the transcripts are necessary to his appeal, he is not entitled to relief.

D. Grant Has Failed To Show That The Denial Of His Motion To Augment Amounted To A Denial Of His Right to Effective Assistance Of Appellate Counsel

Grant is entitled to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). However, he has cited nothing in support of his proposition that his attorney provided him ineffective assistance of counsel because the Supreme Court denied his motion to augment the record with the

transcript of his 2006 jurisdictional review hearing. It is well established in Idaho law that an appellate court will not consider a claim of error that is not supported by both argument and citation to authority. State v. Grazian, 144 Idaho 510, 518, 164 P.3d 790, 798 (2007); State v. Diaz, 144 Idaho 300, 303, 160 P.3d 739, 742 (2007); State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) ("When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered."). Grant asks this Court to afford him relief but he has cited nothing showing that his Sixth Amendment right to counsel is even implicated in the Supreme Court's denial of his motion to augment. Because a transcript of the 2006 jurisdictional review hearing was not part of the record, despite his attorney's attempts to include it, his attorney cannot have provided ineffective assistance of counsel for failing to have reviewed it.

Grant has failed to show that preparation of the transcript of the 2006 jurisdictional review hearing is necessary to protect his right to due process or effective assistance of counsel. He has failed to show that the record as it currently exists is inadequate. The denial of the motion to augment with the transcript did not deny Grant effective assistance of counsel.

II.
Grant's Claim That The District Court Erred In Denying His Attorney's Motion To Withdraw Was Waived By His Unconditional Guilty Plea

A. Introduction

Before Grant pled guilty to possession of methamphetamine in case CR-2009-19445-FE, his attorney moved to withdraw. (R., vol. II, pp. 230-31.) The district court denied the motion after a hearing. (R., vol. II, pp. 232-33.) Grant thereafter entered an unconditional guilty plea. (R., vol. II, pp. 254-61, 262-64.) Grant attempts on appeal to challenge denial of counsel's motion to withdraw. (Appellant's brief, pp. 17-26.) This Court must decline to consider this claim because Grant waived it by pleading guilty. Alternatively, Grant has failed to show error.

B. By Entering Into A Non-Conditional Plea Of Guilt, Grant Waived His Claim That The District Court Erred In Denying His Attorney's Motion To Withdraw

Grant contends that the district court erred in denying his attorney's motion to withdraw. This issue has been waived, however, by his guilty plea. A guilty plea ordinarily constitutes a waiver of all nonjurisdictional defects in the proceedings. State v. Manzanares, -- P.3d --, 2012 WL 29344 (Idaho 2012); State v. Kelchner, 130 Idaho 37, 39, 936 P.2d 680, 682 (1997); State v. Book, 127 Idaho 352, 354, 900 P.2d 1363, 1365 (1995). A defendant may, with the agreement of the prosecution, enter a conditional guilty plea pursuant to Idaho Criminal Rule 11(a)(2), reserving the right to appeal specified adverse rulings of the trial court. Grant did not enter into such an agreement. Because this issue

was not reserved in Grant's plea agreement, this court should not consider the merits of his claim.

C. Grant Has Failed To Establish An Abuse Of Discretion In Denial Of His Attorney's Motion To Withdraw

Approximately one week prior to Grant's change of plea hearing, Grant's attorney moved to withdraw as counsel of record in the possession of methamphetamine case. (R., vol. II, pp. 230-31.) In his motion to withdraw, counsel stated that he was unable to effectively represent Grant for four reasons: 1) Grant "insisted upon pursing an objective that the undersigned considers imprudent and unreasonable;" 2) Grant "had previously agreed to settle this matter and accept the State's offer and has now rescinded that offer," 3) Grant had "stated that the undersigned has not adequately and competently represented his interests;" and 3) "the relationship between the defendant and the undersigned has become adversarial and the Defendant has indicted [sic] he wants new counsel to advise him in this case." (R., vol. II, p. 230.) At a hearing on the motion, Grant's attorney further explained, "[W]e talked about doing a Rule 11 agreement with the State. I thought we had an agreement with the State to do that. Come right down to it, they would not agree to do a [binding] Rule 11 agreement.... And then my client decided that because we couldn't do that, that he would not accept the plea offer." (Tr., p. 120, Ls. 11-23.) At the hearing, Grant agreed that he wanted new counsel. (Tr., p. 121, L. 25 – p. 122, L. 1.) After considering the request, the district court denied counsel's motion to withdraw. (Tr., p. 123, L. 14 – p. 124, L. 14; p. 124, L. 24 – p. 125, L. 16.)

Grant claims on appeal that the district court failed to adequately inquire into the request for substitute counsel and, he asserts, the appropriate remedy is to remand the matter for further proceedings. (Appellant's brief, pp. 18-24.) Grant also asserts that the district court abused its discretion because it "ignored defense counsel's statement that he could not communicate with Mr. Grant" and due to this purported error, Grant is entitled to vacation of his sentence. (Appellant's brief, pp. 25-26 (capitalization altered; underlying omitted).) Grant's arguments are without merit.

The Sixth Amendment of the United States Constitution and Article I, Section 13 of the Idaho Constitution guarantee the right to counsel. For indigent defendants this includes the right to court-appointed counsel. Gideon v. Wainwright, 372 U.S. 335, 344 (1963); Pharris v. State, 91 Idaho 456, 458, 424 P.2d 390, 392 (1967). The right to counsel does not necessarily mean a right to the attorney of one's choice. State v. Clark, 115 Idaho 1056, 1058, 772 P.2d 263, 265 (Ct. App. 1989). Mere lack of confidence in otherwise competent counsel is not necessarily grounds for substitute counsel in the absence of extraordinary circumstances. State v. McCabe, 101 Idaho 727, 729, 620 P.2d 300, 302 (1980). The constitutional guarantees, however, do entitle a criminal defendant to the assistance of a reasonably competent attorney. See Id. at 728, 620 P.2d at 301. For good cause a trial court may, in its discretion, appoint a substitute attorney for an indigent defendant. I.C. § 19-856.

In support of his contention that Grant was denied a "full and fair opportunity to address the court concerning his desires for substitute counsel"

(Appellant's brief, p. 19), Grant relies upon State v. Clayton, 100 Idaho 896, 606 P.2d 1000 (1980), State v. Peck, 130 Idaho 711, 946 P.2d 1351 (Ct. App. 1997), and State v. Lippert, 145 Idaho 586, 181 P.3d 512 (Ct. App. 2007). However, each of these cases addresses the situation where a defendant requests substitute counsel, rather than where an attorney files a motion to withdraw. Although the ultimate inquiry is the same - whether there has been a breakdown in the attorney-client relationship sufficient to establish an abridgement of the right to counsel, see State v. Davis, 201 P.3d 185, 202 (Oregon 2007) - the procedure may be different.

Unlike the defendants in Clayton, Peck and Lippert, Grant never filed a *pro se* motion asking for discharge of his attorney (Clayton and Peck) nor did he orally initiate a request substitute counsel (Lippert). Rather, Grant's attorney filed a motion to withdraw. Clayton only requires the district court "to afford [a] defendant a full and fair opportunity to present the facts and reasons in support of **his motion** for substitution of counsel." Clayton, 100 Idaho at 898, 606 P.2d at 1002 (emphasis added). Here, because the motion was filed by Grant's attorney and not by Grant, the court was not required to afford Grant a full and fair opportunity to present the facts and reasons in support of Grant's attorney's motion to withdraw. The district court was only required to determine if good cause existed to appoint a new attorney. I.C. § 19-856.

Because the motion to withdraw was filed by Grant's attorney, this situation is more analogous to that in State v. Smith,130 Idaho 450, 942 P.2d 574 (Ct. App. 1997). In Smith, Smith sent the trial court a letter explaining his

reasons for requesting a new attorney. 130 Idaho at 452, 942 P.2d at 576. After receiving a copy of the letter, Smith's attorney filed a motion to withdraw. Id. Smith was present at the hearing on counsel's motion to withdraw and did not dispute the assertions made in support of the motion. Id. The district court denied Smith's attorney's motion, requiring him to remain as counsel until Smith made arrangements for new counsel to represent him. Id. On appeal, Smith did not claim that his attorney was ineffective but rather that the district court should have conducted a more detailed inquiry into the source of the conflict. Id. at 453, 942 P.2d at 577. The court of appeals noted that the district court did not interpret Smith's letter as a motion for substitution of counsel and, thus, did not engage in a "good cause" analysis. Id. Ultimately, the court of appeals held: "having reviewed the explanation given by the public defender at the hearing on the motion to withdraw, and in light of the ambiguity of Smith's letter, we conclude that the district court did not abuse its discretion in denying the motion."[1] Id.

Like in Smith, Grant does not claim that his attorney was ineffective but rather simply asserts that the district court should have made a more detailed inquiry into his attorney's reasons for moving to withdraw. Like in Smith, Grant never filed a motion asking his attorney to withdraw and did not ask for substitute counsel on any basis other than those asserted by his attorney at the hearing on his attorney's motion to withdraw. Rather, like in Smith, it was Grant's attorney, not Grant himself, who filed the motion to withdraw. Thus, like in Smith, because

[1] The court of appeals also noted that the district court's ruling did not foreclose Smith the opportunity to retain private counsel. Id.

Grant's attorney rather than Grant filed the motion to withdraw, the district court did not need to afford Grant a "full and fair opportunity to present the facts" in support of his attorney's motion to withdraw.

To the extent that Peck and Lippert may be applicable, Grant's reliance on these cases is misplaced for an additional reason. Unlike the defendants in Peck and Lippert, who were not afforded any meaningful hearing on their motions, Grant was, in fact, afforded a hearing on his attorney's motion. As stated in Lippert, the purpose of the inquiry is to make an "assessment into the validity" of the defendant's concerns. Lippert, 145 Idaho 586, 596, 181 P.3d 512, 522. It stands to reason then that the nature of the inquiry may vary depending on the nature of the defendant's allegations and the specificity with which they are made.

At the hearing, the court inquired about the motion, and Grant's attorney explained, "[W]e talked about doing a Rule 11 agreement with the State. I thought we had an agreement with the State to do that. Come right down to it, they would not agree to do a [binding] Rule 11 agreement.... And then my client decided that because we couldn't do that, that he would not accept the plea offer." (Tr., p. 120, Ls. 11-23.) He later explained, "I think communication has broke down. I don't think I can communicate with him." (Tr., p. 124, Ls. 18-20.)

Grant was present at the hearing and did not dispute his attorney's assertions. Thus, unlike the defendants in Lippert and Peck, he was afforded a hearing and the court had sufficient information to make an "assessment into the validity" of the concerns of Grant and his attorney.

Finally, Grant asserts that the district court abused its discretion when it denied his attorney's motion to withdraw because it ignored the communication breakdown between Grant and his attorney. (Appellant's brief, pp. 24-26.) Grant is incorrect; a review of the record and applicable law shows that the court conducted an adequate inquiry and properly denied the motion.

An abuse of discretion will be found if the denial of a motion for substitution of counsel results in the abridgement of an accused's right to counsel. State v. Priest, 128 Idaho 6, 11, 909 P.2d 624, 629 (Ct. App. 1995). It follows that an abuse of discretion will be found in the denial of a motion to withdraw only if such denial results in the abridgement of an accused's right to counsel. The district court was required to conduct a meaningful inquiry to determine whether good cause existed to permit withdrawal of Grant's attorney. Lippert, 145 Idaho at 596, 181 P.3d at 522. Good cause includes an actual conflict of interest, a complete irrevocable breakdown of communication, or an irreconcilable conflict which leads to an apparently unjust verdict. Id.

In U.S. v. Lott, 310 F.3d 1231, 1250 (10th Cir. 2002), the Tenth Circuit explained that the court must determine whether an attorney-client conflict rises to the level of a "total breakdown in communication" or instead whether the conflict is insubstantial or a mere disagreement about trial strategy that does not require substitution of counsel:

> The types of communication breakdowns that constitute "total breakdowns" defy easy definition, and to our knowledge no court or commentator has put forth a precise definition. As a general matter, however, we believe that to prove a total breakdown in communication, a defendant must put forth evidence of a severe and pervasive conflict with his attorney or evidence that he had

> such minimal contact with the attorney that meaningful communication was not possible.

Id. Here, there was no evidence of a "severe and pervasive conflict" between Grant and his attorney. Rather, the evidence showed that there was "mere disagreement about trial strategy," i.e., whether Grant should accept the plea agreement. The district court heard argument on the motion and properly concluded that just because Grant's attorney had a difference of opinion with Grant "with regards to what [Grant's attorney] believes is in [Grant's] best interests," that Grant's attorney could still adequately represent Grant. (Tr., p. 123, L. 14 – p. 125, L. 4.) Further, the district court asked Grant's attorney, "you're able to represent his best interest and proceed to trial if you need to, aren't you?" (Tr., p. 125, Ls. 8-9.) Rather than responding "no," which would have been the logical response had there been a "total breakdown in communication," Grant's attorney simply requested the court to set the case for trial. (Tr., p. 125, Ls. 10-12.) Because there was no evidence of a "total breakdown in communication," the district court did not abuse its discretion in denying Grant's attorney's motion to withdraw as counsel.

III.
Grant Has Failed To Show That The District Court Erred In Admitting The Victim Impact Statement

A. Introduction

Grant asserts that the district court erred in refusing to strike portions of the victim impact statement because, according to Grant, the statement contained inadmissible statements, including the victim's opinion on the

character of the defendant, her opinions about the crime, and her opinion about the appropriate sentence. (Appellant's brief, p. 26.) In support of his argument, Grant relies upon Idaho caselaw addressing the contents of victim impact statements at sentencing in capital cases rather than cases addressing victim impact statements in non-capital cases. Because the authority he relies upon is irrelevant to his situation (a non-capital case) and because the content of the victim impact statement in his case was appropriate for a non-capital case, he has failed to show error. Grant does not even argue that the victim impact statement would not be admissible under the relevant (non-capital) caselaw.

B. Standard Of Review

"The district court has broad discretion in determining what evidence is to be admitted at a sentencing hearing." State v. Matteson, 123 Idaho 622, 625, 851 P.2d 336, 339 (1993) (quoting State v. Johnson, 101 Idaho 581, 583, 618 P.2d 759, 761 (1980)).

C. Grant Has Failed To Show That The District Court Erred In Admitting The Victim's Impact Statement

Article I, section 22(6) of the Idaho Constitution affords victims of crime the right "[t]o be heard, upon request, at all criminal justice proceedings considering a plea of guilty, sentencing, incarceration or release of the defendant, unless manifest injustice would result," and I.C. § 19-5306(1)(e) codifies that right. A "victim" is defined as "an individual who suffers direct or threatened physical, financial or emotional harm as a result of the commission of a crime." I.C. § 19-5306(5)(a). In the context of sentencing, this right to be heard typically is

exercised through a verbal or written statement to the sentencing court that is either presented at the sentencing hearing or included within the presentence investigation report. See, e.g., State v. Card, 121 Idaho 425, 825 P.2d 1081 (1991) (statement included in presentence investigation report); State v. Wickel, 126 Idaho 578, 580, 887 P.2d 1085, 1087 (Ct. App. 1994) (verbal statement at sentencing hearing). So long as manifest injustice is avoided, the sentencing court has no discretion to exclude a victim impact statement. Idaho Const. art. I, § 22(6); I.C. § 19-5306(1)(e). See also State v. Guerrero, 130 Idaho 311, 312, 940 P.2d 419, 420 (Ct. App. 1997) (holding right of a crime victim to address the court at the offender's sentencing hearing is guaranteed by the Idaho Constitution and Idaho Code).

On appeal, Grant asserts that the district court improperly admitted the victim impact statement because it included statements that were based on unsubstantiated prior bad acts and included "characterizations and opinions about the crime, the defendant and the appropriate sentence," which are not admissible under State v. Payne, 146 Idaho 548, 573, 199 P.3d 123, 148 (2008). (Appellant's brief, pp. 27-31.) Although Grant recognizes that Payne is a death penalty case and that historically there has been a "distinction between the use of victim impact statements in death penalty and non-death penalty cases" (Appellant's brief, p. 31), he nonetheless argues that the distinction is "meaningless when viewed in light of the policy underpinnings" of Payne (Appellant's brief, p. 31). He is incorrect. The distinction between a death penalty case and a non-death penalty case is an important one. As noted by the

United States Supreme Court in Booth v. Maryland, 482 U.S. 496, 508 (1987), the formal presentation by the state of the opinions of a victim's family members about either the brutality or senselessness of the crime or the character of the defendant "can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." Thus, in capital cases, such evidence is not permissible because "its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." Id. at 503, quoted in State v. Lovelace, 140 Idaho 73, 80, 90 P.3d 298, 305 (2004).

In a non-capital case, on the other hand, where the sentencing decision is made by a judge, the Idaho appellate courts presume that the sentencing court is able to ascertain the relevancy and reliability of the broad range of information and material which is presented to it during the sentencing process. State v. Pierce, 100 Idaho 57, 58, 593 P.2d 392, 393 (1979); State v. Bundy, 122 Idaho 111, 113, 831 P.2d 953, 955 (Ct. App. 1992); State v. Holmes, 104 Idaho 312, 314, 658 P.2d 983, 985 (Ct. App. 1983). "A sentencing judge may properly conduct an inquiry broad in scope, largely unlimited, either as to kind of information considered or the source from which it may come." State v. Wickel, 126 Idaho 578, 580, 887 P.2d 1085, 1087 (Ct. App. 1994) (citing State v. Chapman, 120 Idaho 466, 816 P.2d 1023 (Ct. App. 1991)).

Idaho appellate courts have repeatedly found the restrictions on impact statements in Booth inapplicable to non-capital cases. State v. Chapman, 120 Idaho 466, 470, 816 P.2d 1023, 1029 (Ct. App. 1991); State v. Waddell, 119

Idaho 238, 242, 804 P.2d 1369, 1373 (Ct. App. 1991); State v. Searcy, 118 Idaho 632, 637, 798 P.2d 914, 919 (1990). The Idaho Court of Appeals has also refused to apply the holding of Lovelace, which found that impact statements advocating a particular sentence violated the Eighth Amendment, to a non-capital case. State v. Deisz, 145 Idaho 826, 832, 186 P.3d 682, 832 (Ct. App. 2008). In holding that the contents of victim impact statements violated the defendant's rights in State v. Payne, the Idaho Supreme Court cited only capital punishment cases. Payne, 146 Idaho at 572-75, 199 P.3d at 147-49.

Contrary to Grant's assertions on appeal, the victim was within her rights to comment on Grant's character and to recommend a sentence. Limitations on these rights are limited to capital cases. See State v. Matteson, 123 Idaho 622, 625, 851 P.2d 336, 339 (1993) (noting "I.C. § 19-5306 does not contain any limitations which would prevent a victim of a crime, at sentencing, from sharing the victim's opinion of the defendant or making a sentencing recommendation."). This Court presumes that sentencing judges are "able to sort out truly relevant, admissible evidence presented in the form of victim impact statements ...." Payne, 146 Idaho at 574, 199 P.3d at 149 (citing Lovelace, 140 Idaho at 81, 90 P.3d at 306).

There is no indication that the court relied on any inadmissible evidence when it sentenced Grant. In fact, Grant does not even explain how the purportedly erroneously admitted statements impacted his sentencing. In her letter, the victim discussed uncharged misconduct. (2010 PSI, pp. 17-19.[2])

[2] Unnumbered pages of the PSI are numbered sequentially.

Grant has failed to show how this information affected his sentence. Nor can he because the record shows the district court properly focused on the actual crimes to which Grant pled guilty in imposing sentence. (Tr., p. 205, L. 17 – p. 215, L. 14.) In addition, the victim asked that Grant receive a sentence of 10 years fixed, and at sentencing orally requested a life sentence. (2010 PSI, p. 19; Tr., p. 192, Ls. 17-21.) The maximum sentence for felony domestic violence is 10 years and Grant received a sentence of ten years with five years fixed, which, as discussed in sections IV and V, *infra*, is appropriate given the egregious facts underlying Grant's domestic battery conviction.

The victim impact statement was properly before the court at sentencing. Given the presumption that sentencing courts are "able to sort out truly relevant, admissible evidence" at sentencing, Grant has failed to show that the district court abused its discretion in admitting the victim impact statement in its entirety.

IV.
Grant Has Failed To Demonstrate That The District Court Abused Its Discretion When It Ordered The Sentences In His 2009 Cases To Run Consecutively To His Sentence In The 2005 Case

A. Introduction

Grant asserts that the district court abused its sentencing discretion when it ordered the sentence in his 2005 case to run consecutively to the sentences in his 2009 cases. (Appellant's brief, pp. 34-39.) Grant asserts that his mental health, substance addiction, childhood abuse, familial support, remorse, and track record of success in treatment are all mitigating factors that the district court failed to adequately consider at sentencing. (Id.) Given the egregiousness of

Grant's crimes and his proven inability to succeed on probation, he has failed to show the district court abused its sentencing discretion.

B. Standard Of Review

When a sentence is within statutory limits, the appellate court will review only for an abuse of discretion. State v. Farwell, 144 Idaho 732, 736, 170 P.3d 397, 401 (2007). The appellant has the burden of demonstrating that the sentencing court abused its discretion. Id.

C. Grant Has Failed To Establish That The District Court Abused Its Sentencing Discretion

To bear the burden of demonstrating an abuse of discretion, the appellant must establish that, under any reasonable view of the facts, the sentence was excessive. State v. Farwell, 144 Idaho 732, 736, 170 P.3d 397, 401 (2007). To establish that the sentence was excessive, he must demonstrate that reasonable minds could not conclude the sentence was appropriate to accomplish the sentencing goals of protecting society, deterrence, rehabilitation, and retribution. Farwell, 144 Idaho at 736, 170 P.3d at 401.

Grant has failed to demonstrate that the sentence he received was an abuse of discretion. A sentence of confinement is reasonable if "it appears necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution." State v. Dushkin, 124 Idaho 184, 185, 857 P.2d 663, 664 (Ct. App. 1993). A sentence need not serve all of the sentencing goals, or weigh each one equally. Id.

The district court specifically applied the correct legal standards for sentencing and considered the goals of sentencing before pronouncing sentence. (Tr., p. 207, Ls. 6-9.) It focused on the factual basis underlying Grant's convictions. (Tr., p. 207, Ls. 10-23, p. 211, L. 4 – p. 212, L. 1.) Grant was first convicted of aggravated battery in 2006. (R., vol. I, pp. 122-24.) He explained that he was involved in a large fight and described what occurred: someone ran "over to them with a metal pipe and starts swingin [sic] it so I run [sic] over toward them and get rushed by like 4 or 5 guys then I pulled the gun out and pointed it to the ground and pulled the trigger, everyone stopped fightin [sic] and started running ..." (2006 PSI, p. 4.) The bullets ricocheted and hit the victim in the head and chest, requiring over 500 stitches. (2006 PSI, p. 2.) Grant admitted that he was under the influence at the time of the shooting. (2006 PSI, p. 5.) The district court sentenced Grant to 10 years with four fixed and retained jurisdiction. (R., vol. I, pp. 122-24.) After successfully completing his rider, the court suspended Grant's sentence and placed him on four years probation. (R., vol. I, pp. 126-27.)

Grant performed abysmally on probation and, in 2009, was charged with possession of methamphetamine in case no. CR. 2009-19445-FE (R., vol. I, p. 211), and with domestic battery, aggravated assault, and unlawful possession of a firearm in case no. CR. 2009-19451-FE (R., vol. II, pp. 344-45). Specifically, in CR. 2009-19451-FE, the state alleged that Grant committed the crime of domestic battery by burning his girlfriend's face repeatedly with a lighted cigarette and committed the crime of aggravated assault by holding a gun to her

head and threatening to kill her. (R., vol. II, p. 345.) He ultimately pled guilty to domestic battery and possession of a controlled substance pursuant to a plea agreement with the state. Given these facts, Grant has failed to show that the district court abused its discretion in ordering an overall sentence of 20 years with nine years fixed.

Grant claims that the district court abused its discretion in light of his mental health issues, his substance abuse issues, his purported remorse, his familial support, his claimed success at treatment, and his childhood abuse. (Appellant's brief, pp. 35-39.) This argument fails to recognize several important facts in the record.

First, Grant asserts that the district court failed to consider his mental health status as a mitigating factor. At sentencing his trial counsel referred on several occasions to Grant's purported mental health issues, arguing that he had not been diagnosed with a mental disorder in 2005 when he committed the first felony and that he was not on his medications when he committed the later felonies. (Tr., p. 198, L. 1 – p. 199, L. 15.) According to his trial counsel, Grant was placed on his medications and stabilized. However, a mental health report that was completed pursuant to I.C. § 19-2524 concluded that Grant's **"ability to ... engage in lawful behavior is not significantly impaired by mental illness as much as his ability to stay sober and straight."** (Mental Health Report, dated 6/9/2010, p. 2 (emphasis added).) His functional impairment due to mental illness was considered "low" and his "primary functional impairment appears to be due to substance abuse." (Id.) The evaluator concluded that Grant should

receive treatment for substance about but, because he failed to meet certain statutory factors in his mental health evaluation, no mental health treatment plan was prepared. (Id., p. 3.)

The district court considered Grant's substance abuse and his completion of a jail-based treatment program (Tr., p. 206, Ls.12-15), considered the letters of support from Grant's family (Tr. p. 206, Ls. 1-7), heard Grant's allocution and his purported remorse (Tr. p. 200, L. 15 – p. 203, L. 12), and reviewed the PSI that contained information concerning Grant's childhood abuse (Tr., p. 174, Ls. 20-22). However, despite the court's awareness of these mitigating factors, the court focused on Grant's behavior – that he fired a loaded weapon into a fight and injured an individual, and that he later purposely burned his girlfriend's face with a lighted cigarette. The district court correctly noted that Grant engaged in "incredibly reckless behavior" in firing the gun and that he "disregarded [his girlfriend] ... as a human being." (Tr., p. 211, Ls. 8-15.) It explained that Grant had been given the opportunity for a retained jurisdiction and probation but "continued to not follow the rules" and that he was not "willing to comply with really what society expect[ed] of [him]." (Tr., p. 212, L. 19 – p. 213, L. 4.) The district court also found that there was an "undue risk that [Grant would] commit further crime" (Tr., p. 209, Ls. 18-19), and that a "lighter sentence – such as, probation or even the Rider Program ... would depreciate the significance of this crime" (Tr., p. 210, L. 25 – p. 211, L. 3).

Grant's overall sentence of 20 years with nine years fixed is not excessive under any reasonable view of the facts. He has failed to show that the district

court abused its discretion in ordering his aggravated assault sentence to run consecutive to his domestic battery and possession of a controlled substance sentences.

V.
Grant Has Failed To Demonstrate That The District Court Abused Its Discretion When It Denied His Rule 35 Motion

A. Introduction

Grant asserts that the district court abused its discretion when it denied his Rule 35 motion for reduction of his sentence. (Appellant's brief, pp. 39-40.) Grant has failed to establish an abuse of discretion.

B. Standard Of Review

If a sentence is within the statutory limits, a motion for reduction of sentence under Rule 35 is a plea for leniency, and the appellate court reviews the denial of the motion for an abuse of discretion. State v. Huffman, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). A sentencing court is under no obligation to modify a legally imposed sentence. State v. Springer, 122 Idaho 544, 545, 835 P.2d 1355, 1356 (Ct. App. 1992). If a sentence is not excessive when it is pronounced, a defendant must show that it is excessive in view of new or additional information presented with his motion for reduction of sentence. Huffman, 144 Idaho at 203, 159 P.3d at 840. If a defendant fails to make this showing, it cannot be said that denial of a Rule 35 motion by the district court represented an abuse of discretion. Id.

C. Grant Has Failed To Establish That The District Court Erred When It Denied His Rule 35 Motion

Grant has failed to show any basis for reversal of the district court's order denying his Rule 35 motion. Grant's Rule 35 motion asked the court for leniency. (R., vol. II, pp. 402-03.) At the hearing on the motion, the only "new information" Grant submitted was a letter written by him and two additional letters of support. (Tr., p. 221, Ls. 7-11; R., vol. II, p. 404; letter dated 9/23/10 from Grant to court and undated letter from mother to court.) After considering the arguments asserted by Grant, the district court denied the motion. (Tr., p. 221, L. 12 – p. 222, L. 24.)

On appeal, Grant contends that the district court abused its discretion in denying his Rule 35 motion because his family supported him and because his rehabilitation continued to progress during his incarceration. (Appellant's brief, p. 40.) In denying his motion, the district court noted that "there really isn't anything new for the Court to consider in this particular case that I didn't already know when I imposed the sentence" (Tr., p. 222, Ls. 3-6) and explained, "I think [Grant] has admirable goals. It doesn't really change much about the underlying facts in this particular case or why I imposed the sentence that I did. Society needs to be protected first and foremost" (Tr., p. 221, Ls. 12-17). The district court concluded,

> Is it a harsh sentence? Not when you really consider the facts and circumstances of the case and the opportunities that not only Judge McDermott, from this Court, gave him, but the chances he has had in life. He just hasn't followed through. He hasn't taken it as seriously as he should have, and he put himself and others in great peril and jeopardy when he acted the way he did in the domestic violence case.

> Quite frankly, if released on probation or even parole in less time that what I imposed here, I really feel like he would go back to the same things he has done before and, quite frankly, put people at risk.

(Tr., p. 222, Ls. 7-22.) Given any reasonable view of the facts, Grant has failed to establish that the district court abused its discretion in denying his Rule 35 motion.

CONCLUSION

The state respectfully requests that this Court affirm Woodrow John Grant's convictions and sentences.

DATED this 20th day of January, 2012.

ELIZABETH A. KOECKERITZ
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 20th day of January, 2012, served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy addressed to:

SHAWN F. WILKERSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in the State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

ELIZABETH A. KOECKERITZ
Deputy Attorney General